U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 October 2006

CASE NO.: 2005-LHC-02291

OWCP NO.: 01-150744

In the matter of:

D. V.[1]
Claimant

v.

W.J. BARNEY
Employer

and

BECKER & GOLDSTEIN, INC. /
SENTRY INSURANCE
Employer / Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Stephen C. Embry, Esq. (Embry and Neusner),
Groton, Connecticut, for the Claimant

Gregory P. Sujack, Esq. (Garofalo, Schreiber, Hart & Storm),
Chicago, Illinois, for Sentry Insurance, the Carrier

Before: Daniel F. Sutton,
Administrative Law Judge

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[1] In accordance with Claimant Name Policy, which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Mem. from C.J. John M. Vittone, ALJ, Claimant Name Policy (July 3, 2006) *available at* http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA") for worker's compensation benefits filed by D. V. (the "Claimant") against his former employers: W.J. Barney ("Barney"); Becker & Goldstein, Inc. ("Becker") and Becker's Carrier, Sentry Insurance ("Sentry"); Groton Piping ("Groton") and Groton's carrier, The Hartford Insurance Company ("Hartford"); and Morrison Knudsen ("Morrison") and Morrison's carrier, Traveler's Insurance ("Traveler's"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the District Director referred the matter to the Office of Administrative Law Judges ("OALJ") for a formal hearing. On January 31, 2006, the undersigned issued an Order Granting Partial Summary Decision and Dismissing Morrison Knudsen and Traveler's Insurance as a potentially liable employer and carrier. The undersigned held a formal hearing on March 22, 2006, in New London, Connecticut, at which time all parties were afforded the opportunity to present evidence and oral arguments. The Claimant appeared at the hearing represented by counsel. However, Barney, Becker, Sentry, and the Director of the OWCP all failed to appear at the hearing and did not have counsel appear on their behalf. The Claimant testified, and documentary evidence was admitted as Claimant's Exhibits ("CX") 1-8. Hearing Transcript ("TR") 15-33. The official papers were admitted without objection as Administrative Law Judge ("ALJ") Exhibits ("ALJX") 1-16. *Id.* at 5-12. At the hearing, the undersigned formally dismissed Groton and Hartford Insurance Company as a potentially liable employer and carrier, without prejudice. TR 12-14.[2] At the conclusion of the formal hearing, the record was held open for thirty days to allow the Claimant to offer the post-hearing transcript of a deposition to be taken from Dr. Niall J. Duhig. *Id.* at 15-17. On May 17, 2006, the Claimant offered said transcript, which has been admitted into evidence as CX 9.[3]

On June 6, 2006, Sentry submitted a Motion for Leave to Enter Appearance Instanter and to Reopen Record of Formal Hearing, ("Sentry Mot. Reopen Rec."). Sentry moved to reopen the record to determine the existence of insurance coverage under the LHWCA, conduct discovery, and prepare and present an adequate defense to the claim. Sentry Mot. Reopen Rec. at 4. On June 15, 2006, the Claimant submitted a Memorandum in Opposition to Motion to Reopen Record, ("Cl. Mem."). The Claimant argued that the record should not be reopened because Sentry already had ample opportunity to request continuances and prepare a defense. Cl. Mem. at 1-2. On June 16, 2006, the undersigned ordered a brief reopening of the record, ("Order Reopening Rec.") until June 30, 2006 for the limited purpose of allowing Sentry to offer evidence bearing on the existence of its coverage to Becker for workers' compensation insurance

[2] At the Claimant's request, dismissal of Groton and Hartford was made without prejudice to these parties being rejoined in the event that subsequently discovered and introduced evidence indicated that they may be liable for any benefits awarded on the claim.

[3] Although the Claimant submitted CX9 after the close of the thirty day period, there were no objections.

under the LHWCA during the relevant periods. Order Reopening Rec. at 2. On June 30, 2006, Sentry submitted a Motion to Offer Evidence Relating to Insurance Coverage and for Leave to File Post-Hearing Brief. Sentry offered the affidavit of Robert Reko, Vice President of Standards and Business Products for Sentry, as Sentry Exhibit ("SX") 1. Sentry Mot. to Offer Evidence at 1; SX 1. On July 25, 2006, the undersigned issued an Order admitting the affidavit of Mr. Reko into evidence and granting the parties until August 21, 2006, to file any written closing arguments.[4] Order at 2. Sentry and the Claimant submitted timely briefs. The record is now closed.

After careful analysis of the evidence contained in the record, and after consideration of the parties' arguments, I conclude that the Claimant is entitled to an award of permanent total disability compensation, interest, medical care, and attorney's fees, which may be payable from the Special Fund as determined by the Director. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

The parties did not enter into any stipulations, thus, no Joint Exhibits are available. The Claimant seeks an award of permanent total disability benefits from January 22, 2003 based on an average weekly wage of $2,164.14; payment of related medical benefits; interest; and attorney's fees.[5] Cl. Br. at 5-6.

III. Summary of the Evidence

A. The Claimant's Background and Employment History

The Claimant was born on November 11, 1948, and was 57 years of age at the time of the hearing. ALJX 11 at 17; TR 19. After graduating from high school in 1967, the Claimant completed an apprenticeship in plumbing and steam fitting in 1972. ALJX 11 at 18. Since then, the Claimant has not had any additional vocational training. *Id.* The Claimant worked in the plumbing and steam fitting industry from 1967 until January 22, 2003. TR 19-20, 24. At the hearing, the Claimant testified that during this period, he was exposed to asbestos in insulation piping, which became airborne when the insulation was removed, and could be seen floating in the air. *Id.* at 20.

The Claimant first worked in the plumbing and steam fitting trade for Groton from 1967 until 1970, as an apprentice helper. *Id.* at 19; ALJX 11 at 3, 23; CX 5 at 2. While employed with Groton, the Claimant worked at Electric Boat Corp. ("EBC") installing piping on boilers and on a "graving" dock for submarines below water level. TR 22; ALJX 11 at 23.[6] During his employment, the Claimant did extensive pier work, such as work on the sound labs on piers, on a

[4] In a letter dated August 2, 2006, the Claimant advised that he did not object to the introduction of Mr. Reko's affidavit and would not offer any rebuttal evidence. Letter from David N. Neusner, Cl. Att'y, to J. Daniel F. Sutton, OALJ, at 1 (August 2, 2006).

[5] The Claimant seeks payment of benefits from the Special Fund. CL. Br. at 6.

[6] Graving is misspelled in the Hearing Transcript as "graven."

state pier, and on EBC's piers. ALJX 11 at 24. The Claimant testified that, as a result of his work installing piping for Groton, he was exposed to asbestos on more than one occasion. TR 22; ALJX at 23.

After his employment with Groton, the Claimant was employed by Barney from 1970 to 1971, and in 1975. TR 22; ALJX 11 at 25; CX 5 at 3. In 1970, while working for Barney, the Claimant worked at Pfizer re-routing ammonia lines from the docks to the tanks. TR 22. During his employment with Barney, the Claimant tore out old piping and re-piped tanks and piping systems. ALJX 11at 26. At the hearing, the Claimant attested that he was exposed to asbestos throughout his employment with Barney, while ripping out and replacing production and steam piping, which was covered with asbestos. TR 21.

The Claimant was later employed by Morrison, also at EBC, on a graving dock from 1975 until 1976. *Id.* at 24; ALJX 11 at 26; CX 5 at 5. The Claimant primarily worked underneath a pier and the graving dock installing hangers and piping and asserted that this work exposed him to asbestos. ALJX 11 at 27.

The Claimant was employed by Becker at a submarine base on the Thames River in 1970 and from 1976 until 1977. TR 22-23, 27; ALJX 11 at 25; CX 5 at 3. At the submarine base, the Claimant ran a saltwater cooling line, pumping power to the boiler, which is used to cool an oil-fired turbine. TR 22, 28-29. The Claimant also worked on piers to run the saltwater line, pipes, and hangers underneath the piers. *Id.* at 27. Ships that came in and out for navigation use the piers, which are also located near wharfs. *Id.* Additionally, the Claimant worked on the adjoining land areas, powerhouse, and along the piers installing a new oil-fired turbine line. *Id.* at 29. The powerhouse was twenty to thirty feet away from the river, and provided power to the wharfs and submarines that came in and out of the river. *Id.* at 30. At the hearing, the Claimant stated that the saltwater line and piping under the pier was covered with asbestos insulation that he personally removed. *Id.* at 27-28, 30. Although there was no asbestos involved in his powerhouse work, the Claimant stated that the atmosphere there was very dusty and dirty, and thus, he was exposed to grinding dust, paint, and dirt at the powerhouse. *Id.* at 29. Additionally, the Claimant testified that neither he, nor Becker, took any precautions to guard against his exposure to asbestos. *Id.* at 31. Specifically, the Claimant asserted that Becker never gave him any safety equipment, masks, or respirators throughout his employment, nor did it use water to prevent the asbestos from becoming airborne. *Id.* at 28, 31.

The Claimant was employed by C.N. Flagg ("Flagg") at the Millstone nuclear power plant from 1974 to1975, 1977 to 1979, and 1983 until 1984. ALJX 11 at 28; CX 5 at 4. At the hearing, the Claimant stated he performed maintenance work replacing an intake pipe that would bring in water for cooling at a nuclear power plant, exposing him to asbestos. TR 24, 28. The Claimant testified that although he was exposed to asbestos, the employment was not at a maritime site because he did not work on any ships, piers, or wharfs, and the ships did not use the nuclear power plant. *Id.* 23. Furthermore, all work performed by the Claimant for Flagg was land-based. *Id.* He continued to work for numerous employers in the plumbing trade until January 22, 2003, which the Claimant testified caused him further exposure to asbestos. *Id.*; CX 2. Although the Claimant's subsequent employments also exposed him to asbestos, he did not perform the work at any maritime sites. TR 20-21, 23-24; ALJX 11 at 28.

The Claimant has not worked since January 22, 2003, following the recommendation of Dr. John P. Bigos. TR 24. In 2002, the last year of his full employment, the Claimant earned $112,587.47, at a weekly wage of $2,165.14. *Id.* at 24; CX 3.

Barney filed a Certificate of Dissolution on January 24, 1996. CX 8. The New York State Department of Taxation and Finance consented to the dissolution of Barney to the Secretary of State on March 27, 1996. *Id.* No party submitted evidence as to Barney's workers' compensation insurance coverage under the LHWCA.

Becker is also no longer in business. TR 28. The Office of the Secretary of State for the State of Connecticut shows Becker as having been dissolved as of July 12, 1982. Letter from Neusner at 1-2. Sentry insured Becker for workers' compensation coverage under the workers' compensation law of the State of Connecticut from 1976 until 1977. SX 1. However, Sentry did not insure Becker for workers' compensation insurance under the LHWCA. *Id.*

B. Medical Evidence

The Claimant is currently under the care of Dr. Duhig, although he was previously treated by Dr. Bigos.[7] TR 15-16. The Claimant underwent various pulmonary function tests, all of which show he suffers from moderate restrictive lung disease. CX 2; CX 9 at 5-6. The most recent lung function test performed on January 26, 2004, places the Claimant at a Class III impairment, with a rating of 28% to 30% moderate impairment of the whole person. CX 1; CX 9 at 7. Additionally, Dr. Duhig attested that because the condition of the Claimant's restrictive lung has not changed, the impairment is permanent. CX 9 at 7.

Although the Claimant had a 20-year history of smoking a pack of cigarettes a day, Dr. Duhig testified that the Claimant's exposure to asbestos, grinding dust, welding fumes, and other pulmonary irritants are contributing factors in hastening or aggravating the development of his restrictive lung disease. CX 9 at 5-6. The Claimant has stated that he currently has problems breathing, such as shortness of breath with moderate physical activity, which Dr. Duhig asserted is consistent with his lung disease. CX 2; CX 9 at 6-7. Dr. Duhig also recommended that the Claimant should stay away from dusty environments or those with toxic fumes. CX 9 at 6-7. Dr. Duhig further stated that if the Claimant wished to continue working, he would need to find another field of employment. *Id.*

At the hearing, the Claimant testified that he stopped working on January 22, 2003 following the recommendation of Dr. Bigos that he stop climbing and working around chemicals. TR 24. Because these activities were the nature of his employment, the Claimant testified that he could no longer work in the plumbing industry. *Id.* The Claimant attested that

[7] There is conflicting evidence as to when the Claimant began treatment. CX 1; CX 9 at 5; TS 24. A letter from Dr. Niall J. Duhig, on August 2, 2004, stated the Claimant has been a patient of his office, and began treatment with Dr. Bigos, since May 12, 2003. CX 1. However, Dr. Duhig later testified in his deposition that Dr. Bigos had been seeing the Claimant as far back as 2001. CX 9 at 5. Furthermore, the Claimant testified at the hearing that he stopped working on January 22, 2003, after Dr. Bigos advised him to.

he currently has trouble walking over fifty to sixty feet, claiming that this would require him to stop so that he may catch his breath. *Id.* at 25. Furthermore, the Claimant also asserted that he has difficulty performing any physical activities, which he was previously able to perform, such as walking up stairs, mowing the lawn, or playing softball. *Id.* Additionally, the Claimant stated that he resides in Florida during the winter because the warm weather makes it easier for him to breath, which becomes difficult when it is cold. *Id.* at 26.

IV. Findings of Fact and Conclusions of Law

A. The Merits of the Claim

1. Causal Relationship between Claimant's Restrictive Lung Disease and Employment

Section 2(2) of the LHWCA defines an injury as an accidental injury arising out of or in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally and unavoidably results from such accidental injury. 33 U.S.C. § 902(2). Section 20(a) of the LHWCA provides a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). The section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 820 (1976). To invoke the presumption, the Supreme Court has held that there must be a *prima facie* claim for compensation, to which the statutory presumption refers; that is, a claim "must at least allege an injury that arose in the course of employment as well as out of employment." *U.S. Indus./Fed. Sheet Metal, Inc., et al., v. Director, OWCP*, 455 U.S. 608, 615 (1982). A claimant presents a *prima facie* case by establishing (1) that he or she sustained physical harm or pain and (2) that an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kelaita v. Triple A. Machine Shop*, 13 BRBS 326, 330-31 (1981).

Here, the Claimant has offered medical evidence showing that he suffers from moderate restrictive lung disease; therefore, a harm or injury has been established. CX 1, 2, 9. Regarding evidence that work conditions existed which could have caused the harm, the Claimant testified at the hearing that he personally removed asbestos covering from the saltwater lines and piping, without the use of safety equipment or precautions to guard against asbestos exposure, and was exposed to grinding dust, paint, and dirt while working as a plumber for Becker. TR 27-31. The Claimant also offered evidence, through Dr. Bigos' medical records and Dr. Duhig's testimony, that the Claimant's occupational exposure to asbestos, grinding dust, welding fumes, and other lung irritants were contributing factors in hastening or aggravating the development of his restrictive lung disease. CX 9 at 6. Accordingly, I find that the Claimant has made the requisite *prima facie* showing to invoke the section 20 presumption that his injury, restrictive lung disease, was causally related to his employment. *See U.S. Indus./Fed. Sheet Metal, Inc.*, 455 U.S. at 612-613*; Fortier v. Gen. Dynamics Corp.*, 15 BRBS 4 (1982).[8]

[8] It is noted that there is evidence in the record that the Claimant has a long history of smoking, which may have contributed to his lung disease. CX 9 at 5. However, the LHWCA does not require that the workplace harm or injury be the sole, or even primary, cause of the injury, but merely that it contribute to the injured worker's

Once a claimant makes a *prima facie* showing of harm or pain and the existence of working conditions which could have caused or aggravated the harm or pain, the party opposing entitlement must produce substantial evidence severing the presumed connection between such harm and employment or working conditions. *Volpe v. Ne. Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1981); *Am. Grain Trimmers v. OWCP*, 181 F.3d 810, 815-17 (7th Cir. 1999); *see Sprague v. Director, OWCP*, 688 F.2d 862, 865-66 (1st Cir. 1982). No party has offered any evidence to rebut Dr. Duhig's medical opinion that the Claimant's occupational asbestos exposure contributed to his lung disease. Therefore, the presumption is not rebutted, and I conclude that the Claimant has established that his lung disease arose out of and in the course of his employment.

2. The Claimant's Employment Coverage

In order for a claimant to be eligible for benefits under the LHWCA, the employee must be injured in the course of his employment, and the employee must be employed in a maritime employment; that is, the loading, unloading, repairing, dismantling, or building of a vessel. 33 U.S.C. § 902(2)-(3); *Chesapeake and Ohio Ry. v. Schwalb*, 493 U.S. 40, 45 (1989); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73-74 (1979). Generally, the employee must also qualify under both the situs and status tests. The situs test limits the geographic scope of the LHWCA and is satisfied when the injury occurs "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 904; *Ford*, 444 U.S. at 73. The status test relates to the nature of the work and requires that the "employee" be "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker," excepting certain enumerated positions. 33 U.S.C. § 902(3); *Ford*, 444 U.S. at 73-74.

After a careful review of the record, I find that the Claimant has demonstrated eligibility for benefits, in that he was injured in the course of his employment as a plumber for a maritime employer engaged in construction and repair on a covered situs and status. At the hearing, the Claimant attested that he was exposed to asbestos when he worked on the construction and repair of the saltwater lines, pipes, and hangers on the piers and adjoining land areas at the submarine base for Becker. TR 22, 27-30. The Claimant testified that he spent all of his time on the piers, adjoining land areas, and powerhouse performing plumbing duties, which included running a saltwater line, pipes, and hangers under the piers, all of which were covered with asbestos, and installing a new oil-fired turbine line at the powerhouse, which exposed him to grinding dust,

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condition. *See Jones v. Aluminum Co. of Am.*, 35 BRBS 37, 41 (2001). If an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Indus. Nw.*, 22 BRBS 142 (1989); *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986); *Rajotte v. Gen. Dynamics Corp.*, 18 BRBS 85 (1986). Dr. Duhig discussed the Claimant's smoking history and provided a well-reasoned and persuasive opinion that the Claimant's occupational asbestos exposure contributed to his lung disease. Since contribution satisfies the LHWCA's causation requirement under the aggravation doctrine, the presence of smoking as a co-contribution does not detract from the Claimant's *prima facie* case

paint, and dirt. *Id.* In addition, the Claimant stated that Becker never provided him with any safety equipment, nor did it take any precautions to guard against his exposure to asbestos, which he personally removed. *Id.* at 27-31. Accordingly, I find that the Claimant satisfies both the situs and status elements for coverage under the LHWCA. *See Simonds v. Pittman Mechanical Contractors, Inc*., 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP,* 35 F.3d 122 (4th Cir. 1994); *Hawkins v. Reid Associates*, 26 BRBS 8, 11 (1992).[9]

3. Nature and Extent of the Claimant's Disability

The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). Disability is generally addressed in terms of its nature, permanent or temporary, and its extent, total or partial. The permanency of any disability is a medical, rather than an economic, concept. The LHWCA defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the claimant to receive a disability award, an economic loss, coupled with a physical and/or psychological impairment, must be shown. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have suffered either no loss, a total loss, or a partial loss of wage earning capacity. Disability under the LHWCA involves "two independent areas of analysis -- nature (or duration) of disability and degree of disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

a. Nature of Disability – Temporary or Permanent?

The initial issue to be resolved is whether the Claimant's disability is temporary or permanent in nature. There are two approaches to determine the nature of a disability. The first method to determine "whether an injury is permanent or temporary is to ascertain the date of 'maximum medical improvement.'" *Trask*, 17 BRBS at 60 (citing *McCray v. Ceco Steel Co.*, 5 BRBS 537 (1977)). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. *Williams v. Gen. Dynamics Corp.*, 10 BRBS 915 (1979). Under the second approach, a disability will be considered permanent if the claimant's impairment "has continued for a lengthy period of time and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968).

[9] Sentry raised various arguments as to the Claimant's situs and status qualifications under the LHWCA, as well as Becker's employment qualifications. Sentry Br. at 5-6. However, Sentry made these arguments in the event that Sentry was found liable as Becker's workers' compensation carrier under the LHWCA. *Id.* at 5. Sentry has presented evidence that it was not Becker's carrier under the LHWCA, which the Claimant did not rebut. SX 1; Letter from Neusner at 1-3. Therefore, these arguments need not be addressed. Moreover, for the reasons discussed above, Sentry's arguments would have been rejected.

Dr. Duhig stated that the Claimant's impairment was permanent because the condition of his restrictive lung disease has not changed. CX 9 at 7. Furthermore, the various pulmonary function tests that have been performed on the Claimant, which span from 2003 until 2004, have shown that he suffers from moderate restrictive lung disease without any improvements to his impairment reported. CX 2; CX 9 at 5-6. Additionally, the medical evidence presented by the Claimant shows a decline in his condition as time progresses. CX 2. No employer, nor carrier, has presented any evidence to counter the Claimant's showing that his restrictive lung disease is permanent. The Claimant's restrictive lung disease has continued for a lengthy period, appears to be of an indefinite duration, and is not of a normal healing period. Accordingly, I find that the Claimant's disability has been permanent in nature since he stopped working in 2003.

b. Extent of Disability – Partial or Total?

Generally, a disability may be characterized as either partial or total. A three-part test is employed to determine whether a claimant's disability is partial or total: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of the job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that a suitable alternative employment is readily available in the employee's community for individuals of the same age, experience, and education as the employee, which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of a suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt at obtaining that type of employment. *Am. Stevedores Inc. v. Salzano* 538 F.2d 933 (2d Cir. 1976); *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). To meet its production burden, an employer "does not have to find an actual job offer for the claimant, but must merely establish the existence of jobs open in the claimant's community that he could compete for and realistically and likely secure." *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2d Cir. 1991), (*Turner*, 661 F.2d at 1042-1043). The claimant may also refute the employer's showing of suitable alternate employment by demonstrating that he was precluded from working because of participation in an OWCP approved vocational rehabilitation program. *La. Ins. Guar. Assoc. v. Abbott*, 40 F.3d 122, 127-129 (5th Cir. 1994).

The Claimant has clearly shown, through both his own and Dr. Duhig's testimony, as well as the reports of Dr. Bigos, that he is unable to return to his former employment, which included working with various lung irritants and performing strenuous physical activities. TR 17-31; CX 2; CX 9 at 5-7. The Claimant asserted that he has difficulty walking over fifty to sixty feet and performing any physical activities, all of which cause him shortness of breath. TR 25. Furthermore, the Claimant also stated that his breathing problems are often aggravated when exposed to asbestos, fumes, or other pulmonary irritants. CX 2; CX 9 at 6. Likewise, Dr. Duhig testified that the Claimant should stay away from environments with toxic fumes or dust exposures. CX 9 at 6-7. Dr. Duhig further attested that if the Claimant wished to continue working, he would need to find another field of employment. *Id.* Based on this evidence, I find that the Claimant cannot perform his former job because of his employment related injury. Therefore, the Claimant has successfully established his *prima facie* case of total disability.

No party has presented any evidence of a suitable alternative employment. Sentry argued in its post-hearing brief that "it is possible the Claimant may be capable of returning to some type of employment." Sentry Br. at 3-4. However, it has not offered any evidence that suitable alternative employment is readily available in the Claimant's community for individuals of his same age, experience, and education. Thus, no employer has satisfied its burden of establishing a suitable alternative employment. Accordingly, the Claimant is entitled to permanent total disability benefits from January 22, 2003, the date the Claimant became aware of his injury and stopped working.[10]

B. Last Maritime Employer and Liability

Having determined that the Claimant has demonstrated that his restrictive lung disease is causally related to his occupational exposure to asbestos, the next question to be determined is the identity of the employer liable for benefits under the LHWCA, pursuant to the "last covered employer" rule. The Second Circuit first articulated this rule as follows:

> [T]he employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

Travelers Ins. Co. v. Cardillo, 225 F.2d 137, 145 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955). The rule was further developed in *Todd Shipyards Corp. v. Black*, 717 F.2d. 1280, 1285 (9th Cir. 1983), *cert. denied* 466 U.S. 937 (1984), and followed by the Benefits Review Board ("BRB") in *Stilley v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 224, 225-26 (2000). In both of these cases, the "last employer" rule, was applied as to hold the claimant's last employer covered under the LHWCA liable for the full amount of the award, even though there was subsequent significant exposure to injurious stimuli in employment not covered by the LHWCA.

In this matter, although the Claimant was exposed to asbestos during subsequent employment, he did not perform the work at any covered situs. TR 20-21, 23-24; ALJX 11 at 28. At the hearing, the Claimant stated that he was exposed to asbestos while replacing an intake pipe for Flagg, a subsequent employer, from 1974 to 1975, 1977 to 1979, and 1983 until 1984. TR 23-24, 28. However, there is no evidence that Flagg was a covered "employer." The LHWCA defines a maritime "employer" as having at least one employee who is engaged in maritime employment, including a longshoreman, harbor-worker, ship repairman, shipbuilder, ship-breaker or a worker engaged in land-based activity that is essential or integral to the loading or unloading of a vessel. 33 U.S.C. § 902(3)-(4); *Schwalb*, 493 U.S. at 45. Additionally, the

[10] On January 26, 2002, the Claimant discontinued working due to a combination of physical ailments and carpal tunnel operation on both hands. ALJX 11 at 19. However, this seems to have been for a limited period, and unrelated to the present claim. *Id.* The Claimant testified at the hearing that he stopped working on January 22, 2003, at the recommendation of Dr. Bigos. Although the Claimant's pre-trial statement alleges that the Claimant became aware of his injury on November 11, 2003, there is no evidence submitted showing this to be the date the Claimant became aware of his injury. Moreover, there is no evidence submitted from Dr. Bigos or Dr. Duhig establishing the exact date they informed the Claimant of his condition. Thus, the Claimant's testimony is the only evidence submitted with an exact date. Therefore, the date of January 22, 2003, the date the Claimant testified as the date Dr. Bigos informed him of his condition, is used as the date of awareness.

LHWCA defines maritime coverage as extending to U.S. navigable waters, including adjoining piers, wharfs, dry docks, terminals, building ways, marine railways, or other adjoining areas used by a maritime employer. 33 U.S.C. § 903(a). There is no evidence that Flagg had any employees who engaged in maritime employment or land-based activities essential or integral to maritime employment. In addition, the Claimant testified that he did not work on any ships, piers, or wharfs after he stopped working for Becker in 1977. TR 23-24; ALJX 11 at 28. The Claimant's Social Security records show that he earned income from a number of employers after 1977. CX 5. However, there is no evidence that these were maritime employers or that the Claimant performed the work at maritime sites. Consequently, I find that Becker, as the last employer covered under the LHWCA to expose the Claimant to injurious lung stimuli, is liable for the full amount of any benefits awarded under the LHWCA.[11]

C. Effect of Becker's Dissolution and Default

As discussed above, the record shows that Becker was dissolved in 1982, and there is no evidence that Becker had any insurance coverage for LHWCA claims when it employed the Claimant from 1976 until 1977. While a covered employer is generally responsible for on-the-job injuries sustained by its workforce, section 18(b) of the LHWCA provides additional potential relief to claimants in employer-default situations:

> In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 44 [33 U.S.C. § 944], make payment from such fund upon any award made under this Act and in addition, provide any necessary medical, surgical, and other treatment required by section 7 of the Act [33 U.S.C. § 907] in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer.

33 U.S.C. § 918(b); *see also* 20 C.F.R. § 702.145(f). The LHWCA provides that before a petition can be made to the Special Fund, the claimant must first obtain a judgment in the United States District Court based upon a supplemental order issued by the Director showing that the employer is in default on a compensation award entered by an ALJ. 33 U.S.C. § 918(a); *Meagher v. B.S. Costello, Inc.*, 20 BRBS 151, 154 (1987).

Upon consideration of the procedures set forth in section 18 of the LHWCA, and in view of the broad discretion conferred upon the Secretary of Labor in deciding whether the Special Fund shall pay compensation in cases involving bankrupt, insolvent, or otherwise defaulting employers and carriers, the ALJ clearly lacks jurisdiction to order payment by the Special Fund. It is equally clear, however, that section 18 of the LHWCA contemplates the entry of an award *pro forma*, when appropriate, in cases involving insolvent employers and disabled workers. *See*

[11] Sentry raised arguments as to the application of the "last employer" rule against Becker. Sentry Br. at 6-7. However, Sentry made these arguments in the event that it was found liable as Becker's workers' compensation carrier under the LHWCA. *Id.* at 5. Sentry has presented evidence that it was not Becker's carrier under the LHWCA, which the Claimant did not rebut. SX 1; Letter from Neusner at 1-3. Therefore, these arguments need not be addressed. Moreover, for the reasons discussed above, Sentry's arguments would have been rejected.

generally In re W. States Drywall, Inc., 150 BR 774 (1993) (holding automatic stay, in the context of a bankruptcy petition, did not preclude an entry of judgment in Department of Labor proceedings, but rather, an enforcement of judgment). Indeed, it is the award pursuant to the administrative proceeding, followed by the employer's default, which triggers potential access to the Special Fund.

Under such circumstances, the award following a determination of entitlement is a procedural mechanism, which begins the process by which the injured worker may petition the Secretary of Labor for relief from the Special Fund. *See, e.g., Hunt v. S. Portland Shipyard*, 2000-LHC-2149 (ALJ) (2001); *Morey v. S. Portland Shipyard*, 1997-LHC-790 (ALJ) (1998); *Howell v. Jacksonville Shipyard*, 1996-LHC-2217 (ALJ) (1997). In this case, the Claimant asserts that Becker is defunct, and he introduced documentation from the Secretary of the State for the State of Connecticut showing that Becker dissolved on July 12, 1982. Letter from Neusner at 1-3. In addition, there was testimony at the hearing from the Claimant that he believed Becker was no longer in business. TR 28. The record also contains an affidavit from Robert Reko, Vice President of Standards and Business Products for Sentry, attesting that after an unsuccessful, yet diligent, search, Sentry could not find any evidence that it issued Becker workers' compensation insurance coverage under the LHWCA. SX 1. Given this uncontradicted evidence that Becker is defunct, and since no responsible carrier has been located, it would appear that this case may be appropriate for relief from the Special Fund, pursuant to section 18(b).

D. Compensation and Benefits Due

1. Compensation

As compensation for his permanent total disability from January 22, 2003, the Claimant is entitled to payments equal to 66 2/3 per centum of his stipulated average weekly wage of $2,165.14 per week. 33 U.S.C. § 908(a). However, the Claimant's compensation is "not to exceed an amount equal to 200 per centum of the applicable national average weekly wage," as determined by the Director. 33 U.S.C. § 906(a). In addition, the Claimant is entitled to annual adjustments to the permanent total disability compensation payments as provided by section 10(f) of the LHWCA. 33 U.S.C. § 910(f). Therefore, the appropriate rate of compensation shall be determined as of the filing date of this Decision and Order with the Director.

2. Interest

Although not specifically authorized in the LHWCA, the BRB and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP,* 594 F.2d 986 (4th Cir. 1979); *Santos v. Gen. Dynamics Corp*., 22 BRBS 226 (1989); *see Found. Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in

authorizing interest awards as consistent with the remedial purposes of the LHWCA). Interest is due on all unpaid compensation including funeral expenses, but is not payable on penalties assessed pursuant to section 14(e). *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989); *Cox v. Army Times Publ'g Co.*, 19 BRBS 195, 198 (1987). As the Claimant has not received the full amount of the compensation payments, to which he has been entitled since January 22, 2003, I find that he is entitled to interest on any compensation payments that were not timely made.

The BRB has also concluded that inflationary trends in the economy have rendered a fixed interest percentage rate no longer appropriate to further the purpose of making a claimant whole. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). The BRB has further held that "the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)" which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Id.* Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. My order incorporates, by referencing this statute, and provides for its specific administrative application by the Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the Director.

3. Medical Care

An employer found liable for the payment of compensation is additionally responsible, pursuant to section 7(a) of the LHWCA, for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Serv., Inc.*, 8 BRBS 130 (1978). As there has been no evidence offered in defense of Becker's liability for medical care, I find that Becker is liable, pursuant to section 7(a) of the LHWCA, for those medical expenses that were reasonably and necessarily incurred as a result of the Claimant's work-related illness, moderate restrictive lung disease. *See Colburn v. Gen. Dynamics Corp.,* 21 BRBS 219, 222 (1988).

4. Attorney's Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the LHWCA. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). On August 24, 2006, the Claimant's attorney, Stephen C. Embry, filed an itemized application for attorney's fees and costs in the amounts of $3,560.43. No party has raised any objections to the requested fees and costs. Upon review, I find that the fee application complies with the requirements of 20 C.F.R. § 702.132(a) and that the fees and costs requested are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded. This order on attorney's fees is enforceable, provided counsel successfully applies to the Secretary and receives Special Fund relief, which affords the Claimant the benefits hereinafter ordered. If the Secretary declines the Special Fund relief, which the Claimant seeks, the approval of counsel's fee petition shall be void.

V. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the award shall be administratively performed by the Director.

It is therefore **ORDERED** that:

1. The Employer, Becker & Goldstein, Inc., shall pay to the Claimant, D. V., permanent total disability compensation based on an average weekly wage of $2,165.14 per week, but not exceeding 200 per centum of the applicable national average weekly wage as determined by the Director, plus any applicable annual adjustments pursuant to 33 U.S.C. § 910(f), from January 22, 2003, and continuing until further ordered;

2. The Employer, Becker & Goldstein, Inc., shall pay to the Claimant, D. V., interest on any past due compensation benefits at the United States Treasury Bill rate applicable under 28 U.S.C. § 1961, computed from the date each payment was originally due until paid;

3. The Employer, Becker & Goldstein, Inc., shall provide and pay for all medical care and expenses reasonably and necessarily incurred by the Claimant as a result of his work-related restrictive lung disease pursuant to 33 U.S.C. § 907(a);

4. The Claimant may be entitled to relief from the Special Fund for payment of the permanent and total disability benefits pursuant to 33 U.S.C. § 918(b), which is dependent upon a supplemental order issued by the Director;

5. The Employer, Becker & Goldstein, Inc., shall pay attorney's fees and expenses in the amount of $3,560.43 to the Claimant's attorney, Stephen C. Embry; and

6. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts